

# Is Psychological Research on Self-Control Relevant to Criminal Law?

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## INTRODUCTION

During recent years, scholars have asked whether scientific discoveries should have implications for criminal law. Specifically, some argue that findings in genetics and neuroscience will or should alter our assumption that most adults are responsible for their conduct. Criminal law should rest on a proper understanding of human behavior, and, therefore, scholars should mine scientific explanations of behavior for normatively relevant facts.

New and future discoveries from neuroscience occupy most of recent academic commentary on science and criminal responsibility. This focus on novel and merely potential neuroscientific findings makes Rebecca Hollander-Blumoff's recent arguments all the more fascinating: she argues that criminal law scholars have neglected a rich body of social-psychological research developed over two decades on the mechanisms of self-control.<sup>1</sup> Hollander-Blumoff aims to remedy this neglect by examining the research for doctrinal and theoretical implications and inviting other scholars to join the endeavor.

Hollander-Blumoff cites conflicting conceptions of "self-control" at work in law and psychology to support a persuasive conclusion: the law's distinction between controlled and uncontrolled behavior is based on a normative judgment, not on some non-evaluative "empirical reality."<sup>2</sup> Thus, neuroscience's empirical methods cannot determine how the law should define "control."

Indeed, we should be skeptical about neuroscience's current relevance to criminal responsibility. Neuroscience seeks to explain the causes of human conduct in terms of neural mechanisms. The law, on the other hand, concerns itself with folk-psychological explanations of behavior: to understand why a person—as opposed to a brain—fired a gun, we must investigate her beliefs, desires, and intentions at the time.<sup>3</sup> That the law assumes a psychological model of behavior speaks in favor of Hollander-Blumoff's invitation to explore the self-

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<sup>1</sup> Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 501 (2012).

<sup>2</sup> *Id.* at 505.

<sup>3</sup> Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility From Neuroscience*, 9 MINN. J. L. SCI. & TECH. 1, 2–3 (2008).

control research. "If any sciences have an outside chance of [having implications for moral and criminal responsibility] it is the ones that study behaviour directly rather than its proximate physical causes in the brain."<sup>4</sup>

Hollander-Blumoff concludes that the research supports two broad insights. First, she argues that "taking psychological research on self-control seriously indicates that criminal law may vastly underdescribe the scope of situations in which an individual lacks the ability to control her actions."<sup>5</sup> She emphasizes that the set of behavior deemed beyond an actor's control is more broadly construed in psychology than in law. Second, Hollander-Blumoff argues that the research "helps uncouple self-control questions from broader questions about the existence of free will."<sup>6</sup> That is, the research suggests that in any given instance of wrongdoing, factors exist to help us decide whether an individual had the ability to exercise self-control regardless of the position we might take within free will debates.

This article accepts Hollander-Blumoff's invitation to explore the self-control research. After Part I briefly explains the research, Part II asks whether the conception of self-control under study is relevant to any conception of self-control implicit in criminal law. We must carefully distinguish conceptions of control implicit in criminal law before assessing whether this research has legal relevance. Part III argues that the research sheds little light on issues related to criminal responsibility and blameworthiness. It leaves open utilitarian questions, such as whether the research might aid deterrence or law enforcement strategies, focusing solely on responsibility and blameworthiness. Specifically, this part argues that the research does not suggest that the law underdescribes the scope of situations in which individuals could not control themselves. Finally, Part IV argues that the research is incapable of "uncoupl[ing] self-control questions from broader questions about the existence of free will."<sup>7</sup> Moreover, the research cannot support the claim that the law is neutral with respect to free will debates. The reason is that the law is not neutral. Responding to recent arguments by Adam Kolber,<sup>8</sup> this part defends the view that legal criteria of responsibility are compatible with the non-existence of contra-causal free will.

## I. THE SOCIO-PSYCHOLOGICAL RESEARCH ON SELF-CONTROL

"Self-control" is used in multiple ways in everyday conversation. Any individual who continuously acts irresponsibly might be described as lacking self-control. We often describe as "out of control" a teenager who stays out all night,

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<sup>4</sup> Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 1775, 1778 (2004).

<sup>5</sup> Hollander-Blumoff, *supra* note 1, at 505.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Adam Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807 (2014).

does not care about school, and engages in dangerous or illegal behavior. We describe such individuals as lacking self-control because their behavior is bad or against their own well-being from an objective point of view.

The psychological research, however, is not concerned with such moral evaluation. Rather, the conception of self-control under study entails the existence of some tension between an individual's current psychological state (e.g., the experience of a particular desire) and her own values or long-term goals. Though psychologists do not all share the same working definition of "self-control," the term used broadly refers to "any efforts by the human self to alter any of its own inner states or responses."<sup>9</sup>

Some psychologists concentrate more narrowly on conscious efforts to regulate behavior, seeking to understand the self's ability to control impulses. The object of research is willpower, the ability to "delay immediate satisfaction for the sake of future consequences."<sup>10</sup> One faces the prospect of exercising self-control when experiencing a desire for short-term benefit even though she believes she should act differently for long-term consequences or to satisfy her values.

Failure to delay immediate gratification is associated with many personal difficulties: overeating, smoking, alcohol and drug addiction, unwanted pregnancy, and gambling, to name a few.<sup>11</sup> For practical purposes, it should be useful to know the causes of self-control failure. What causes have researchers found?

Following Hollander-Blumoff, let us focus on two strands of research. The first, advocating a "strength model" of self-control, finds that individuals have "a limited stock of willpower, and when that stock is depleted, self-control ceases to be effective."<sup>12</sup> That is, any exercise of self-control uses some of that individual's self-regulatory strength, increasing the odds of a self-control failure before that strength is restored. Researchers have found that other exercises of an executive function (such as choice-making and controlling emotions) deplete an individual's self-regulatory strength.<sup>13</sup>

The second strand of research—"construal-level theory"—posits that the way in which we construe events and our potential choices affect self-control.<sup>14</sup> Sometimes we focus on an event's specific details which affect our direct

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<sup>9</sup> Kathleen D. Vohs & Roy F. Baumeister, *Understanding Self-Regulation: An Introduction*, in *HANDBOOK OF SELF-REGULATION* 1, 2 (Roy F. Baumeister & Kathleen D. Vohs eds., 2004).

<sup>10</sup> Yuichi Shoda, Walter Mischel, & Philip K. Peake, *Predicting Adolescent Cognitive and Self-Regulatory Competencies from Preschool Delay of Gratification: Identifying Diagnostic Conditions*, 26 *DEVELOPMENTAL PSYCHOL.* 978, 978 (1990).

<sup>11</sup> Vohs & Baumeister, *supra* note 9, at 3.

<sup>12</sup> Brandon J. Schmeichel & Roy F. Baumeister, *Self-Regulatory Strength*, in *HANDBOOK OF SELF-REGULATION: RESEARCH, THEORY, AND APPLICATIONS* 84 (Roy F. Baumeister & Kathleen D. Vohs eds., 2004).

<sup>13</sup> Roy F. Baumeister, *Ego Depletion and Self-Control Failure: An Energy Model of the Self's Executive Function*, 1 *SELF & IDENTITY* 129, 130–33 (2002).

<sup>14</sup> Kentaro Fujita & Jessica J. Carnevale, *Transcending Temptation Through Abstraction: The Role of Construal Level in Self-Control*, 21 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 248, 248 (2012).

experience; other times, we think in more general terms about the type of event that it is.<sup>15</sup> For instance, if we are looking forward to a dinner with friends this evening, typically we might think about the details: the menu, board games we will play, conversations we might have. Researchers deem this focus on specific details as “low-level construal.”<sup>16</sup> In contrast, when thinking about events further in the future, we typically construe them in “high level” terms, focusing on their abstract, goal-relevant features.<sup>17</sup> Thus, when pondering summer plans, our focus is likely to be on general features of our options, such as relaxing or spending time with friends.

Psychologists have found that construing events in high-level terms “leads people to understand single instances as examples of broad classes of events, [and thus] . . . promotes sensitivity to the broad implications of one’s behavior.”<sup>18</sup> Thinking about a possible action’s goal-relevant features helps one focus on the ways in which it implicates what one values, not simply one’s momentary desire. Unsurprisingly, psychologists find that high-level construal of contemplated behavior promotes self-control. If a dieting person is choosing a snack between raw vegetables and cake, he is more likely to choose the vegetables if he construes the choice in “high-level” terms, as “between weight loss and hedonism,” instead of focusing on different tastes.<sup>19</sup>

## II. TO WHAT EXTENT IS “SELF-CONTROL” A CONCERN OF CRIMINAL LAW DOCTRINE?

Hollander-Blumoff argues that an examination of this research “cast[s] doubt on the descriptive validity of legal perspectives on self-control and crime, and offer[s] potential guidance as we think about appropriate levels of culpability and punishment.”<sup>20</sup> A descriptive claim underlies her normative claims: she seeks to show that the notion of self-control is important to various criminal law doctrines, from the *actus reus* and *mens rea* requirements to excuses such as insanity and duress.<sup>21</sup> To assess the extent to which the research might provide normative insight for criminal law, we must examine whether the conception of self-control assumed in the research matches or is relevant to conceptions of self-control involved in these various doctrines. Undoubtedly, the criminal law is directed towards agents who have the capacity to control their behavior. However, is the psychologists’ interest in self-control relevant to any conception of control implicit

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<sup>15</sup> *Id.*

<sup>16</sup> Kentaro Fujita et al., *Construal Levels and Self-Control*, 90 J. PERSONALITY & SOC. PSYCHOL. 351, 352 (2006).

<sup>17</sup> *Id.*

<sup>18</sup> Fujita & Carnevale, *supra* note 14, at 249.

<sup>19</sup> *Id.* at 249.

<sup>20</sup> Hollander-Blumoff, *supra* note 1, at 503.

<sup>21</sup> *Id.* at 513–23.

in criminal law standards? Once we know which doctrines involve a related conception of self-control, we can examine whether the research fails to describe accurately the scope of uncontrollable behavior.

### A. *Prima Facie Elements of Culpability*

Let us start with the *actus reus*—or voluntary act—requirement. Though the word “voluntary” has multiple senses within criminal law,<sup>22</sup> in this context it requires a “*willed* bodily movement[.]”<sup>23</sup> Thus, in acting voluntarily, an agent exerts some sort of control over her action. An agent whose body moves due to a reflex, spasm, or seizure lacks voluntary control and, thereby, does not perform an act.<sup>24</sup>

Though the *actus reus* element involves some ability to control oneself, its minimal requirement of conscious control renders it irrelevant to the research on self-control. When faced with temptation, whether an individual acts to satisfy an immediate desire or acts in accordance with her better judgment, she nonetheless *acts*; that is, she nevertheless consciously wills her movements. Whether she is responsible for her action is a separate question, but a self-control failure does not entail an unconscious bodily movement. Moreover, where an agent is exonerated because he did not perform a voluntary act, we would not describe his bodily movement as a self-control failure. A self-control failure implies that the agent should have acted differently, which implies that the agent did, in fact, act (or omit to perform an action she could have taken).

The *mens rea* requirement is based on the principle that culpability depends on mental state. If one intentionally injures another, she is more culpable than if she had engaged in the same conduct without that intent, but rather with awareness of a substantial risk she would cause injury. The harm doer who was aware of the unjustifiable risk she created is more culpable than the unaware harm doer who should have perceived a risk. The agent who harms another accidentally, without reason to be aware of any risk, is not culpable at all, even though she consciously willed her bodily movements.

Arguably, one reason the purposeful or knowing harm doer is more culpable than the reckless or negligent harm doer is that the former has more *control* over

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<sup>22</sup> The very same action might be described under law as voluntary and not voluntary, depending on the relevant sense of “voluntary.” Take crimes excused because of duress. An excuse is necessary because the coerced defendant satisfied the *voluntary act* requirement by willing his action. In that sense, his act was voluntary. However, we also often describe the individual’s action as *not* voluntary (and, thus, not punishable) because his choices were unfairly constrained by the coercing agent. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 134 (6th ed. 2012).

<sup>23</sup> Michael S. Moore, *Actus Reus*, in *ENCYCLOPEDIA OF CRIME & JUSTICE* 15, 17 (Joshua Dressler ed., 2002).

<sup>24</sup> MODEL PENAL CODE § 2.01(2) (1962); Morse, *supra* note 3, at 10–11.

the consequences of her conduct.<sup>25</sup> The knowing actor is aware that her conduct will cause the prohibited result; the reckless actor is aware of a risk that her conduct will cause the result. However, the relatively higher degree of control of the knowing actor has nothing to do with a heightened ability to resist a tempting short-term benefit. Assuming she is aware of the relevant facts, the difference is based on the higher odds that her conduct will cause the prohibited result. Whether an individual engages in some conduct or causes some prohibited harm purposely, knowingly, recklessly, or negligently is independent of whether she acted to satisfy a disvalued short-term desire or whether she acted in accordance with her better judgment. The conception of self-control under psychological study is not relevant to the conceptions of control implicit in *actus reus* and *mens rea* requirements.

### B. *Insanity*

Insanity standards, along with the infancy excuse, represent the law's attempt to define the general capacities required for an agent to be held legally responsible for her acts.<sup>26</sup> Agents who may be held accountable have the capacity to *control* their actions, but what kind of control is required?

#### 1. Cognitive insanity tests

The classic *M'Naghten* test, which focuses solely on a defendant's cognitive capacities, deems a defendant insane if, at the time of her crime, she lacked capacity to know the nature and quality of her act or that it was wrong.<sup>27</sup> An agent has the requisite control over her conduct, and is thus sane, if she has the capacity to understand the nature and moral quality of her conduct.<sup>28</sup>

The psychological research on self-control is not relevant to the conception of control expressed through cognitive insanity tests. To see this point, consider: (i) an agent can be sane under *M'Naghten* yet fail to exercise self-control; and (ii) an agent can be insane under *M'Naghten* yet succeed in exercising the kind of self-control under study. First, that an agent can be sane yet fail to exercise self-control is apparent. I know exactly what I am doing when I procrastinate or overeat. An individual may judge that, all things considered, he should not possess heroin, but he does. Knowing the nature of his act and having capacity to know it is wrong, he is sane under *M'Naghten*.

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<sup>25</sup> LARRY ALEXANDER ET AL., *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 79 (2009).

<sup>26</sup> MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 42 (1997).

<sup>27</sup> *M'Naghten's Case* [1843] 8 ER 718, 722.

<sup>28</sup> The analysis here references *M'Naghten*, but it would be the same under the cognitive prong of the Model Penal Code standard.

That an agent may be insane yet exercise self-control is not as obvious. But consider Andrea Yates, who, while suffering from psychosis, drowned her five children. Yates indicated to psychiatrists that she believed killing her children was obligatory because if she did not, they would “perish in the fires of hell.”<sup>29</sup> Let us stipulate that Yates had a very strong desire not to kill her children and that she fought against this desire because she believed that the morally best action was to kill her children. If these stipulations were true, then Yates would have exercised self-control; however, she could still be judged insane under *M’Naghten* if she did not know her acts were wrong. The conception of control implicit in cognitive insanity standards is distinct from the kind of self-control under study.

## 2. Volitional insanity tests

As stated, a jurisdiction’s insanity standards help define the kind of *control* an agent needs for responsibility. However, the word “control,” as used in some insanity standards, does not refer to the entire set of capacities required for responsibility. Rather, some insanity statutes divide the capacities required for responsibility into two prongs: a cognitive prong and a volitional, or *control*, prong. While cognitive prongs focus on a defendant’s beliefs, volitional or control prongs focus on a defendant’s will: even assuming she knew what she was doing, did the actor have adequate capacity to execute a desire to conform her conduct to the law’s demands. Take Connecticut’s insanity standard:

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to *control* his conduct within the requirements of the law.<sup>30</sup>

This standard has both a cognitive prong (“lacked substantial capacity . . . to appreciate . . . wrongfulness”) and a volitional prong (“lacked substantial capacity . . . to control his conduct”). But notice that the notion of “control” is only used with respect to the volitional criterion of responsibility.

Interestingly for our purposes, the capacity for volitional control is sometimes equated with the capacity for self-control. A volitional control prong is often referred to as the “irresistible impulse test”; however, as one Michigan court has observed, that reference is unfortunate because the “test encompass[es] not only a sudden overpowering, irresistible impulse but any situation or condition in which the power, ‘*the will power*’ to resist, is insufficient to restrain commission of the wrongful act.”<sup>31</sup> Commenting on Michigan’s standard, the court explained that a

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<sup>29</sup> Yates v. State, 171 S.W.3d 215, 218 n.2 (Tex. Crim. App. 2005).

<sup>30</sup> CONN. GEN. STAT. ANN. § 53a-13 (West 2005) (emphasis added).

<sup>31</sup> People v. Jackson, 627 N.W.2d 11, 13 (Mich. Ct. App. 2001) (emphasis added).

defendant “need not prove that he totally lacks the *capacity for self-control* in order to establish the volitional prong of the statutory test.”<sup>32</sup> Other courts also refer to volitional capacity as the capacity for self-control.<sup>33</sup>

Here we have a criminal law doctrine interested in a kind of control relevant to the psychological research. Both concern the power to resist a short-term desire for the sake of a long-term desire or interest. Only a minority of states has a volitional prong as volitional incapacity is a controversial notion. Moreover, volitional prongs require that an incapacity be due to a mental disease or defect, whereas the self-control research does not specifically study persons with mental illness.<sup>34</sup> Nonetheless, perhaps, as Hollander-Blumoff suggests, the research can shed light on questions and controversies regarding volitional incapacity, such as demonstrating that the scope of legally excusable agents is smaller than the scope of agents who truly had a volitional incapacity. But before investigating whether the research can shed normative light on questions about volitional incapacity, let us note other doctrines concerned with volitional control.

### C. Other Doctrines Involving Volitional Control

Many involuntary intoxication statutes track the Model Penal Code, containing a cognitive and a volitional prong. Accordingly, a defendant may be excused if he shows that “as result [of involuntary intoxication, he] lack[ed] capacity either to appreciate the criminality of his conduct *or to conform his conduct* to the requirements of law.”<sup>35</sup> Using similar language, some states also permit a “guilty but mentally ill” verdict based on diminished volitional capacity. For example, while the insanity standards in Delaware, Pennsylvania, Alaska, and South Carolina contain purely cognitive tests,<sup>36</sup> these states allow the “guilty but mentally ill” verdict where the defendant had a diminished capacity to conform his conduct to the law’s requirements.<sup>37</sup> Delaware’s “guilty but mentally ill” standard

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> See, e.g., *United States v. Lyons*, 731 F.2d 243, 248 (5th Cir. 1984) (criticizing volitional control standards by expressing skepticism about psychiatrists’ ability to measure “a person’s capacity for self-control”); *State v. Madigosky*, 966 A.2d 730, 738 (Conn. 2009) (defendant, relying on “volitional prong,” claiming “that he could not stop himself,” and court concluding that the “jury reasonably could have found . . . that [his] extreme emotional disturbance resulted in a loss of self-control”); *Kwosek v. State*, 100 N.W.2d 339, 346 (Wis. 1960) (“The concept of man’s freedom of self control is in accord with the basic theory of criminal law to punish those who ought to be punished. This test . . . enlarges the present concept of insanity . . . by including and emphasizing the volitional factor in human conduct . . .”).

<sup>34</sup> See, e.g., ALA. CODE § 13A-3-1 (1988); HAW. REV. STAT. ANN. § 704-400 (West 1984); KY. REV. STAT. ANN. § 504.020 (LexisNexis 1988).

<sup>35</sup> ALA. CODE § 13A-3-2(c) (emphasis added); see also ARK. CODE ANN. § 5-2-207(a)(1) (1977); COLO. REV. STAT. § 18-1-804 (2013); HAW. REV. STAT. § 702-230 (West 1986).

<sup>36</sup> ALASKA STAT. § 12.47.010 (2013); 11 DEL. CODE ANN. tit. 11 § 401 (2013); 18 PA. CONS. STAT. § 314(c)(2) (1982); S.C. CODE ANN. § 17-24-10 (1989).

<sup>37</sup> ALASKA STAT. § 12.47.030 (2013); 18 PA. CONS. STAT. § 314(c)(1) (1982); S.C. CODE ANN.



actually references willpower, stating that the verdict is appropriate where a defendant's "mental illness or mental defect . . . left such person with insufficient *willpower* to choose whether the person would do the act or refrain from doing it."<sup>38</sup> However, these laws do not imply that defendants receiving this verdict are less than fully responsible for the conduct. Finally, evidence of diminished volitional capacity may be presented as mitigation for sentencing purposes in both capital<sup>39</sup> and non-capital<sup>40</sup> contexts.

One might propose that the rationale for the affirmative defense of duress could be volitional incapacity. The suggestion would be that the coerced agent wants to avoid breaking the law but is unable to bring her will in harmony with that desire because of fear caused by threat. Following Stephen Morse, I think duress is not best interpreted as an instance of volitional incapacity.<sup>41</sup> We should excuse an agent acting under threat of death, for example, even if his volitional capacity was undiminished: if we could not fairly expect someone in his position to refrain from violating the law, then we are in no moral position to punish him. Moreover, even if some instances of duress involve diminished volitional incapacity, we do not excuse agents for having weak wills in such situations. The law limits situations of duress to those in which the threat is death, serious bodily injury, or, in more modern statutes, one that "a person of reasonable firmness . . . would have been unable to resist."<sup>42</sup> With these objective criteria, the law prohibits a duress excuse for having insufficient self-control.<sup>43</sup>

The manslaughter-provocation defense is similar in that one might suggest that it is based on a defendant's diminished capacity for volitional control in the heat of passion. However, though a defendant must show a causal connection between provocation, his state of passion, and his act, he need not argue volitional incapacity. Instead of asking whether the defendant could have refrained, the law directs jurors to an objective inquiry: a defendant may successfully raise the partial defense only if he faced *adequate* provocation, and provocation is adequate only if it might cause *ordinary* or *reasonable* persons to lose self-control. However, the psychological research on self-control does not shed light on the self-control strength of ordinary or reasonable persons in general, let alone their self-control strength in the face of the kind of provocation at hand. The research does not present any scenarios that involve coercive threats or provocation. Thus, though

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§ 17-24-20 (1989).

<sup>38</sup> DEL. CODE ANN. tit. 11 § 401(b) (2013) (emphasis added).

<sup>39</sup> ARIZ. REV. STAT. ANN. § 13-751(G)(1) (2013); ARK. CODE ANN. 5-4-605(3) (2013); COLO. REV. STAT. § 18-1.3-1302(4) (2013); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (2013).

<sup>40</sup> ARIZ. REV. STAT. ANN. § 13-701(E)(2) (2013).

<sup>41</sup> Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1058-59 (2002).

<sup>42</sup> MODEL PENAL CODE § 2.09(1).

<sup>43</sup> Michael S. Moore, *The Philosophy and the Neuroscience of Volitional Excuses*, 2012, INST. OF L. & PHIL. 36.

duress and provocation may involve self-control failures, the self-control research cannot help us discern the right outcome in any particular case, and thereby does not give us reason to question current standards.

Nonetheless, the capacity for volitional control is relevant to some criminal law doctrines and is relevant to the conception of self-control under study. Even if the psychological research does not study subjects with “mental disease or defect” or those who have been involuntarily intoxicated, perhaps the psychological research can show that there are persons who lacked volitional capacity even though the law would not grant an excuse. We can now investigate whether Hollander-Blumoff is right that the research suggests that the law underdescribes the scope of persons who lack the ability to control themselves. Should the law recognize an excuse for volitional incapacity that is not captured by current doctrines? To answer that question, we will ask, “Does the research provide information helpful to defining the line between failures of self-control for which we are responsible and failures for which we are not?” I argue that the research does not supply such helpful information in particular cases, and, as such, does not give us reason to think criminal law doctrines entail problematic outcomes.

### III. THE RESEARCH DOES NOT INFORM CULPABILITY CRITERIA

#### A. *Assessments of Responsibility*

It is tempting to think that the psychological research provides useful information about culpability because it aims to study the “*capacity* for self-control.”<sup>44</sup> It seems natural that it should help determine when individuals lack or possess that capacity, which in turn should help us assess responsibility for self-control failures. Indeed, psychology articles explicitly state that an individual whose self-regulatory strength has been taxed or who construes a potential event in low-level terms has a diminished capacity or ability to exercise self-control. For example, in one study, research participants who were asked to eat radishes and had to exercise self-restraint by not eating nearby cookies spent less time trying to solve puzzles than participants who did eat the cookies.<sup>45</sup> In discussing their findings, the authors state that the exercise of self-control “seems to have consumed some resource and therefore left people *less able to persist* at the puzzles.”<sup>46</sup> Other authors write that the strength model predicts that “self-

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<sup>44</sup> Roy F. Baumeister, *Yielding to Temptation: Self-Control Failure, Impulsive Purchasing, and Consumer Behavior*, 28 J. CONSUMER RES. 670, 671 (2002) (emphasis added).

<sup>45</sup> Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252, 1256 (1998).

<sup>46</sup> *Id.* (emphasis added); see also Baumeister, *supra* note 13, at 130 (stating that after exercising self-control, the “depleted self is then less able to carry out further acts of self-control”); Tanja S. Stucke & Roy F. Baumeister, *Ego Depletion and Aggressive Behavior: Is the Inhibition of Aggression a Limited Resource?*, 36 EUR. J. SOC. PSYCHOL. 1, 3 (2006) (“We predicted that participants who [first had to self-regulate] . . . would be less able to overcome their angry reactions

regulation will be followed by a period of *diminished capacity* to engage in subsequent self-regulation before the resource builds up again.”<sup>47</sup> In describing the phenomena under study, one psychologist writes that “[r]esearchers refer to this *inability* to make decisions and behave in accordance to one’s global interests as self-control failure.”<sup>48</sup>

Hollander-Blumoff claims that psychological research on “the capacity for self-control” is relevant to judgments of legal responsibility for multiple reasons. With regard to the strength model, she suggests that the research supports reduced or eliminated culpability for an individual who commits a crime against his better judgment after prior choices, affect regulation, or some other tax on his self-regulatory resources. Some individuals might experience an urge to commit a violent act that is “directly connected to the negative emotion they are experiencing and that the action they believe will ameliorate their negative emotional state is the act of violence itself.”<sup>49</sup> This fact is relevant to assessing culpability, Hollander-Blumoff suggests, because “[i]f affect regulation does trump self-control, some violent crime may be explained as an effort to improve mood.”<sup>50</sup>

However, the research does not support widening the scope of reduced culpability judgments. First, the mitigating doctrine of voluntary manslaughter has long recognized that strong emotion, in some circumstances, can diminish culpability because it makes self-control very difficult. The fact that the law does not include a general partial excuse for other crimes certainly raises an interesting question as to why it is only offered in the homicide context. Perhaps the manslaughter defense should be eliminated<sup>51</sup> or perhaps a generic partial responsibility defense should be available when other circumstances render self-control especially difficult.<sup>52</sup> Either way, the psychological research, itself, does not add to these debates given that the law already acknowledges that an individual’s responsibility for some conduct or harm could be diminished when exercising self-control was unduly difficult.

Moreover, the fact that an agent chose crime after his self-regulatory resources were taxed does not imply that the agent’s moral responsibility for his conduct was insufficient for full legal accountability. That his self-regulatory

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toward the experimenter [for insults] than would people in the control condition.”).

<sup>47</sup> Sabrina D. Bruyneel & Siegfried Dewitte, *Engaging in Self-Control Results in Low-Level Construals*, 42 EUR. J. SOC. PSYCHOL. 763, 763 (2012) (emphasis added).

<sup>48</sup> Kentaro Fujita, *Seeing the Forest Beyond the Trees: A Construal-Level Approach to Self-Control*, 2 SOC. & PERS. PSYCH. COMPASS 1475, 1475 (2008) (emphasis added).

<sup>49</sup> Hollander-Blumoff, *supra* note 1, at 546.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Adrian Howe, *More Folk Provoke Their Own Demise: Homophobic Violence and Sexed Excuses—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence*, 19 SYDNEY L. REV. 336 (1997) (arguing against the law of provocation).

<sup>52</sup> See, e.g., Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003) (arguing for a generic partial excuse).

resources were diminished might help *explain* his criminal conduct, in that the depletion of self-regulatory strength was a *cause* of his unfortunate choice; perhaps he would have refrained had his self-regulatory resources been restored to a higher level. Nonetheless, that his resource depletion explains his behavior as a cause is not, by itself, relevant to his responsibility for his choice and action. It remains an open question whether he had sufficient rational and volitional capacity to be fairly held responsible. The psychological research, which might help identify the causes of his criminal choice, does not provide any guidance to determining whether the agent's rational and volitional capacities were sufficient for moral or legal accountability.

The analogy between self-regulatory strength and physical strength is useful here. Imagine a person holding up herself on a chin-up bar; that she let go after ten seconds does not tell us whether her muscles had enough strength to hold on longer. Perhaps she has a low pain threshold. Maybe if she were promised money to hold on for twelve seconds, she would have. The point is that we do not know her muscles' actual capacity from the fact that she let go. Likewise, that a person actually fails to exercise self-control does not tell us whether she could have exercised self-control, even if her resources were depleted to some extent.

The psychological studies measure neither individuals' general capacity for self-control nor their specific ability to exercise self-control on a given occasion. Rather, they try to explain why people succeed or fail in exercising self-control by discovering circumstances or conditions that make it *more or less likely* that an individual will exercise self-control on a particular occasion. To illustrate, one study aimed to measure preferences for immediate versus delayed gratification between two groups, one primed for high-level construal and the other for low-level.<sup>53</sup> The results showed that participants who were primed to high-level construal "displayed a *reduced tendency* to prefer immediate over delayed outcomes" compared with those primed for low-level construal.<sup>54</sup> However, that participants primed for low-level construal displayed an increased tendency to prefer immediate gratification does not show whether any individual was *compelled* to choose immediate gratification. Other studies in support of construal theory demonstrate that "high-level construal increases the likelihood that people will use prospective self-control strategies such as self-imposed punishment."<sup>55</sup> But again, that an individual was less likely, compared to others, to use a prospective self-control strategy does not imply that she was compelled in a manner which undermines responsibility.

The likelihood that an individual will perform a particular act at a future time does not entail whether she will be responsible for that act should she perform it,

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<sup>53</sup> Kentaro Fujita & H. Anna Han, *Moving Beyond Deliberative Control of Impulses: The Effect of Construal Levels on Evaluative Associations in Self-Control Conflicts*, 20 PSYCHOL. SCI. 799, 800 (2009).

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> Fujita & Carnevale, *supra* note 14, at 250.

even if that likelihood is extremely high. Imagine a parent who, every night, tucks his child in to sleep and reminds her that he loves her. We can predict with a very high degree of certainty that this parent will perform the same actions tonight. Nonetheless, without reason to believe otherwise, the parent is responsible for that conduct. The same analysis applies to blameworthy actions. Think of that relative who intentionally insults someone at every family gathering. Regardless of whether her cruel remark was likely and predictable in the circumstances, she is responsible for it (assuming adequate rational and volitional capacities). Neither “predicted” nor “likely” entails or even suggests “excused.”

Understanding the nature of our assessments of capacity reveals why the usefulness of the psychological research is limited. Recall our previous conclusion that the conception of self-control under study is relevant to doctrines that excuse or mitigate for volitional impairment. The idea behind a volitional impairment is that the agent, despite knowing the nature of her conduct, could not conform her behavior to the law’s demands. Ongoing dispute exists about whether an explanation of legal excuses requires appeal to volitional incapacity and whether the law should recognize volitional incapacities. But assuming we can make intelligible judgments about volitional impairments, how do we assess whether an agent *could have* conformed her conduct at the time of crime? That an individual chose and intended her conduct does not indicate decisively that she had adequate volitional control; after all, affirmative defenses, including volitional excuses, are potentially relevant *after* a factfinder concludes that the defendant committed a voluntary act with the prohibited mens rea. The question is, how do we assess whether an offender could have made the appropriate choice and acted upon it?

We answer that question by pondering hypothetical situations that are closely similar, yet different, from the actual circumstances in which the agent made a wrongful choice.<sup>56</sup> The “policeman at the elbow” test is illustrative of the method we use to assess whether an individual could have chosen or acted otherwise. We ask: would the individual have committed the crime *if* a police officer were there threatening arrest?<sup>57</sup> To assess an individual’s capacity, we employ hypotheticals in which at least some facts are changed; if all facts about the offender’s physical state and circumstances were exactly the same, there is no reason to think his choice and act would be any different.

Now let us imagine an individual who succumbs to a temptation to commit crime although he believes he should not because of the negative long-term consequences. Let us further stipulate that this individual’s self-control failure can be explained by his tendency to construe options in low-level terms, failing to focus on reasons to refrain. Our offender has no cognitive impairments; we are

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<sup>56</sup> DANIEL C. DENNETT, *FREEDOM EVOLVES* 63 (2003); Moore, *supra* note 43, at 15–21.

<sup>57</sup> See, e.g., *State v. Forrest*, 578 A.2d 1066 (Conn. 1990); *People v. Jackson*, 627 N.W.2d 11 (Mich. App. 2001); *State v. Wood*, No. 58437, 1991 WL 76041 at \*4 (Ohio App. May 9, 1991) (“While we concede the ‘policeman-at-the-elbow’ test is not recognized as a valid test for insanity in Ohio, . . . it is directly probative of defendant’s ability to refrain.”).

interested in whether he has a volitional impairment. Thus, we must employ a counterfactual that we think fairly sheds light on whether he had the capacity to act on his belief that he should not commit crime.

In constructing the hypothetical, we may ask whether the individual would have committed the crime had he, in fact, kept focus on long-term benefits and chosen not to engage in crime. Perhaps whenever this individual consciously chooses not to engage in a criminal act, he immediately and persistently reconsiders his choice and thus often fails to exercise self-control. That tendency is a moral flaw, and generally we do not excuse an individual if his failure to exercise self-control is based on a moral flaw.<sup>58</sup> Thus in constructing the hypothetical, we can ask whether he would have acted on his prior commitment not to commit crime had he focused on long-term consequences, assuming a person without his moral flaw would have. If the offender *still* would have committed the crime, then we can conclude that he, indeed, does have some volitional impairment such that his capacity to execute his will is diminished to the point where excuse or blame mitigation is appropriate. We would not necessarily excuse an agent for self-control failure even if his failure is due to construing his options in low-level terms.

These observations are also relevant to Hollander-Blumoff's suggestion that the criminal law could consider low self-regulatory strength as an "innate defect, just as insanity or diminished capacity may be."<sup>59</sup> Low self-regulatory strength, as a generic trait, is not and should not be relevant to criminal responsibility, regardless of whether it is innate. Insanity is an excuse, not because it is an innate defect, but because it implies that the offender lacks the requisite psychological powers required for responsibility. Self-regulatory strength certainly varies among individuals, but the law need not determine whether such differences imply fine-grained differences in culpability, if they even do. Low self-regulatory strength is relevant to an individual's responsibility only if the agent lacked adequate capacity to conform his conduct to the law's demands. However, as discussed above, the research does not help us determine when an individual's self-regulatory strength was so low that his volitional capacity was too low for a fair ascription of responsibility.

### B. *Assessments of Moral Blameworthiness*

The research suggests that agents have better opportunity to grasp high-level aspects of potential acts that would take place far in the future. All else equal, an agent is more blameworthy if he had better opportunity to evaluate potential criminal conduct than someone who acted without time to reflect. Hollander-

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<sup>58</sup> Moore, *supra* note 43, at 35–36. Cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 540, 551 (5th ed. 2009) (discussing the exclusion of bad traits and "idiosyncratic moral values" from "reasonable person" and "reasonable explanation" determinations in manslaughter contexts).

<sup>59</sup> Hollander-Blumoff, *supra* note 1, at 544–45.

Blumoff argues that the research demonstrates that the individual who premeditates an act in the distant future is more blameworthy because he “is likely to have [had] a higher level construal of that act.”<sup>60</sup>

First, the moral principle that an agent is relatively more blameworthy for wrongful action after premeditation is already accepted in the law. Homicide statutes reflect this commitment. Moreover, although other crimes do not include premeditation and deliberation as a *mens rea* element, judges consider evidence of planning and lack of planning as aggravating and mitigating, respectively, when sentencing offenders.

One might respond that psychological research at least affirms the moral principle endorsed by law. However, the research does not provide support. It merely conveys that it is more likely for an individual to exercise self-control if she construes an option in high-level terms. The heightened blameworthiness we associate with premeditation is not based on assumptions about when self-control is likely. Consider two scenarios in which an associate asks me to commit robbery. In the first, I construe the potential robbery in high-level terms; in the second, though I have time to consider long-term consequences, I focus solely on immediate benefits. Now assume I commit robbery in both scenarios. Before my decisions, I was more likely to refrain in the first scenario, *ceteris paribus*, than in the second. However, I suggest I am equally blameworthy in either scenario. That high-level construal made self-control more likely does not, itself, entail heightened blameworthiness. If, in the second scenario I had the same capacity and fair opportunity to reflect on reasons not to rob, I am equally blameworthy. Therefore, heightened blameworthiness attached to premeditation is not due to an implicit belief that premeditating criminal actors are more likely to exercise self-control than non-premeditators. More likely, premeditation entails heightened blameworthiness because it demonstrates a greater degree of callousness and indifference to the moral status of other persons.

#### IV. PSYCHOLOGICAL RESEARCH, FREE WILL DEBATES, AND CRIMINAL LAW

Hollander-Blumoff claims that psychological research “helps uncouple” abstract theoretical questions about free will from more concrete, useful questions about whether an individual could control herself at the time of crime:

Whether or not free will “truly” exists is irrelevant, psychological research suggests, to the question of whether or not an individual is able to control his or her behavior in a particular moment . . . . The roots of failure to control one’s behavior, important though they may be, are separate from the question of an individual’s ability to do so at a specific time and place. Psychology’s robust findings on the fine-grained aspects of self-control suggest that self-control is a concept with meaning and

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<sup>60</sup> *Id.* at 537–38.

usefulness for the law, regardless of one's viewpoint about the existence of free will.<sup>61</sup>

Hollander-Blumoff's point seems to be that regardless of whether any individual has contra-causal free will, psychological research suggests that in each individual circumstance, some facts allowed or prohibited self-control. Regardless of whether free will exists, the research allegedly shows that some individuals had capacity to control themselves, depending on whether their self-control resources had been depleted and how they construed their options.

Hollander-Blumoff's conclusion is related to her view about the relationship between criminal law and free will debates. She states that, although legal scholars argue about free will, "criminal law doctrine largely pushes these metaphysical questions off to the side, instead focusing on the individual's relationship to the behavior in the moment."<sup>62</sup> On her view, psychological research supports the law's focus on "individual control over particular acts" and its eschewing of "questions of free will, writ large."<sup>63</sup>

Her arguments raise two interesting questions: First, is the psychological research useful regardless of the right view about free will and responsibility? Second, what is the relationship between criminal law and free will debates? The research might support neutrality on free will debates only if the law is, in fact, neutral. Is it? Let's address these questions in turn.

#### *A. Does the Research Uncouple Questions of Free Will and Responsibility?*

The psychological research cannot "uncouple" questions about free will and about whether an individual could have controlled himself at the time of crime. The very question at the heart of free will debates concerns how we should interpret phrases such as "is able to control her behavior" or "could have controlled himself." The research sheds no light on these questions. To know whether the research could aid assessments of responsibility, we must have recourse to some view within free will debates about the criteria of responsibility.

We hold responsible agents who have a certain kind of *control* over their actions. But what kind of control is required? Before turning to criminal law's answer, let us start with theory. One natural response is that control requires free will. Philosophers disagree on whether free will is necessary for responsibility-conferring control and on its nature. Briefly, on some accounts, free will requires the capacity to choose among alternative possibilities. On these accounts, causal determinism is a threat to free will and responsibility. Causal determinism is, loosely, the thesis that every event is causally necessitated by prior events and states of affairs in conjunction with the laws of nature. It implies that, "at any time

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<sup>61</sup> *Id.* at 505.

<sup>62</sup> *Id.* at 513.

<sup>63</sup> *Id.* at 551.



... the universe has exactly one physically possible future.”<sup>64</sup> If there is only one possible physical future, then agents never have alternative possibilities. Theorists who agree that determinism is incompatible with free will and responsibility—incompatibilists—are split into two camps: (1) hard determinists accept the truth of determinism and deny the existence of free will and responsibility; and (2) libertarians deny determinism and accept the existence of free will and responsibility.

Compatibilists argue that causal determinism would not negate any requirement of responsibility-conferring control. The differences among compatibilist theories are not important for our purposes. But to illustrate, one compatibilist account maintains that the pertinent difference between responsible and non-responsible agents is that the former have, “the general ability to grasp and apply moral reasons and to regulate their behavior by the light of such reasons.”<sup>65</sup> The insane are not responsible, not because their conduct is caused, but because they lack sufficient rational powers. The ability to grasp and apply moral reasons and to regulate one’s conduct in light of them is not threatened by the truth of determinism. Even if determinism is true, some agents have the psychological capacity to grasp and apply reasons.

With this backdrop, we can see why the psychological research does not render these debates irrelevant to whether an individual could have exercised self-control on a particular occasion. Consider two agents who desire to steal a shirt. Ms. Self-Control resists; Ms. Shoplifter does not. Stipulate that Ms. Self-Control reflected upon her moral standards and long-term goals, and her self-regulatory resources were not depleted. Ms. Shoplifter construed her options in low-level terms, and her self-regulatory strength was depleted by fatigue. Now stipulate that incompatibilism and determinism are true, rendering both free will and responsibility non-existent. In these circumstances, *neither* Ms. Self-Control nor Ms. Shoplifter was able to control her behavior in the sense required for responsibility, regardless of the research’s findings. The research identifies causes that led to Ms. Self-Control’s success and Ms. Shoplifter’s failure. But whether those causes are relevant to assessments of responsibility will depend, in part, on what view one adopts within debates about the requirements of responsibility-conferring control.

Hollander-Blumoff suggests that an individual’s moral responsibility for a failure to exercise self-control can depend on that person’s psychological tendencies to construe options in high-level or low-level terms: “[T]here are individual differences in construal patterns; perhaps these need to be taken into account when considering criminal behavior.”<sup>66</sup> But for incompatibilists, such differences are normatively irrelevant if they have been causally determined and agents lack contra-causal free will. Psychological differences, even if causally

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<sup>64</sup> JOHN MARTIN FISCHER ET AL., *FOUR VIEWS ON FREE WILL* 2 (2007).

<sup>65</sup> R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 155 (1994).

<sup>66</sup> Hollander-Blumoff, *supra* note 1, at 537.

determined, may matter on compatibilist accounts. Empirical research cannot tell us, independent of free will debates, whether an individual had responsibility-conferring control.

### B. *The Criminal Law Reflects a Position*

Hollander-Blumoff's claim about criminal law is relevant to debates over whether criminal law doctrine reflects a view within free will theory. As Michael Moore argues, that debate is practically important.<sup>67</sup> Social and natural sciences purport to discover causes of crime, and in light of such discoveries, scholars question the basis of criminal responsibility and defense counsel propose new defenses. Arguments have focused on links between crime and rotten social backgrounds, an extra Y chromosome, new psychological syndromes, and neuroscience. To assess these legal claims, we must understand whether causation excuses or mitigates desert under law.

On the best interpretation of criminal law, its responsibility requirements are compatibilist. Its doctrine does not push free will debates aside. Rather, it adopts criteria that can be met by human agents even if every human action and choice is causally determined. Reason does not exist to interpret the law's responsibility criteria as reflecting either incompatibilist view, hard determinism, or libertarianism.

First, unless criminal responsibility laws are based on utilitarian considerations, they must take some stance on free will and responsibility by rejecting hard determinism. Hard determinism is compatible with utilitarian rules because even if hard determinism is true, we may still be interested in producing good consequences and avoiding bad ones. If the criminal law is utilitarian, the free will debates are irrelevant. If the law is concerned with treating individuals fairly based on whether they are morally responsible, then the law must reject hard determinism's skepticism about responsibility.

Moreover, it is unlikely that criminal responsibility laws are based solely on utilitarianism. Even if utilitarian rationales are plausible for some criminal laws, the legal excuses, central to the law's conception of responsibility, rest on non-utilitarian foundations. Take Sanford Kadish's famous invitation to imagine that the elimination of legal excuses would maximize social utility: "Would we then feel there was nothing . . . problematic in giving up [the] excuses . . . ?"<sup>68</sup> We would give up the commitment that punishment wrongs a non-responsible individual. It is unjust or unfair to blame and punish the non-responsible. Insofar as the law holds persons responsible, it leaves only libertarianism and compatibilism as candidates for properly describing its criteria for responsibility.

On the law's face, it is "officially compatibilist,"<sup>69</sup> as Michael Moore and

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<sup>67</sup> MOORE, *supra* note 26, at 488–89.

<sup>68</sup> Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264 (1987).

<sup>69</sup> Greene & Cohen, *supra* note 4, at 1776.

Stephen Morse thoroughly demonstrate.<sup>70</sup> Briefly, with regard to *prima facie* elements of guilt, determinism is irrelevant to whether a defendant committed a voluntary act with a particular mental state. Determinism might be true, yet we can distinguish chosen conduct and involuntary bodily movements. In asking whether a defendant purposely, knowingly or recklessly caused some harm, it is of no interest whether his actions or mental states were determined. If past events and the laws of nature caused my knowledge that harm would occur, I knew nonetheless. Moreover, cognitive insanity standards do not reveal an incompatibilist concern with causation. Possessing or lacking knowledge about the nature of one's act is compatible with determinism.

Compulsion excuses are also compatibilist in that they do not require universal excuse if determinism were true. Recall volitional insanity prongs. The excuse is not based on the notion that some desires necessitate conduct. A defendant's very strong desire for money might cause his choice to embezzle. Nevertheless, he is sane unless his desire sufficiently undermined his capacity for rationality (a compatibilist criterion) or, perhaps, threatened him with such suffering that jurors would find it morally unfair to hold him responsible.<sup>71</sup> Similarly, duress standards ask whether punishment is unfair due to a threat rendering it too difficult for the defendant to avoid crime. The inquiry is explicitly normative, asking whether a person of reasonable firmness would have been able to resist. The question is not whether the threat eliminated contra-causal free will.

Hollander-Blumoff is right, in one sense, in saying that the "roots of failure to control one's behavior . . . are separate from the question of an individual's ability to do so at a specific time and place."<sup>72</sup> If "roots" stands for "causes," then this statement is correct. According to law, causes of self-control failure do not, *per se*, negate the ability to control behavior.

### *C. Objections and Replies*

Although criteria for criminal responsibility seem compatibilist, let us consider objections. First, one might argue that some doctrines are, in fact, based on incompatibilist reasoning. The best example might be that capital defendants have a right at a sentencing trial to introduce evidence of their childhood environment, including abuse suffered.<sup>73</sup> Many jurors find such evidence mitigating, maybe on the correct thought that childhood experiences *cause* later aggression. Also, one might argue that the admission of neuroscientific evidence

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<sup>70</sup> MOORE, *supra* note 26, at 523–37; Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, in 23 CRIME & JUSTICE: A REVIEW OF RESEARCH 329 (Michael Tonry ed., 1998).

<sup>71</sup> *Id.* at 342.

<sup>72</sup> Hollander-Blumoff, *supra* note 1, at 505.

<sup>73</sup> See *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding ineffective assistance in capital trial where counsel failed to conduct reasonable investigation of defendant's life history).

is based on incompatibilist concerns with neural causes of conduct. Some courts even describe defense counsel's mission as explaining the causes of their client's violence: "Counsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime in question."<sup>74</sup>

Nonetheless, capital sentencing evidence does not threaten the compatibilist interpretation of law. Let us start with a neuroscience example. Brian Dugan's attorneys presented his brain scans, along with expert testimony from Kent Kiehl, a neuroscientist who studies persons with psychopathy.<sup>75</sup> Kiehl testified that Dugan scored highly on the standard diagnostic checklist for psychopathy.<sup>76</sup> The defense argued that Dugan's psychopathy is mitigating because it indicates an impaired ability to appreciate moral considerations and to control impulses.<sup>77</sup> Given the psychological diagnosis, what is the brain scan's relevance? It cannot be to show that Dugan's brain caused his murderous acts. Imagine if Kiehl testified, "this brain scan shows that Dugan is especially good at planning and carrying out his intentions. His well-planned out actions were caused by his brain, and thus you should find this mitigating." Needless to say, no defense team would want such testimony. The brain scan evidence provided support for the defense team's claims about Dugan's *psychological impairments*. Counsel hoped that the jury would find mitigating Dugan's diminished capacity for appreciating moral considerations. But note the absence of an incompatibilist concern: the capacity to appreciate moral considerations is compatible with causal determinism.

We find compatibilist reasoning about responsibility even where a court found a capital defendant's mental health evidence less mitigating than evidence of other defendants' neurological abnormalities.<sup>78</sup> In rejecting the defendant's intercase proportionality claim, the Florida Supreme Court stated that while he had "a long history of addiction and substance abuse, there [was] no evidence of organic brain damage or neurological deficiencies resulting from that abuse."<sup>79</sup> Nevertheless, the significance to the court of "organic brain damage or neurological deficiencies" was not that they represent causes of crime. The court did not distinguish the defendant's mental illness from others' neurological deficiencies by saying that only the latter caused crime. Rather, the court rejected the defendant's claim because the expert testimony indicated that he was "both

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<sup>74</sup> *Hooks v. Workman*, 689 F.3d 1148, 1204 (10th Cir. 2012).

<sup>75</sup> Greg Miller, *fMRI Evidence Used in Murder Sentencing*, SCI. NEWS (Nov. 23, 2009), <http://news.sciencemag.org/scienceinsider/2009/11/fmri-evidence-u.html>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Bright v. State*, 90 So. 3d 249, 264 (Fla. 2012).

<sup>79</sup> *Id.* at 264 (citing *Crook v. State*, 908 So. 2d 350, 358 (Fla. 2005); *Penn v. State*, 574 So. 2d 1079, 1080, 1084 (Fla. 1991); *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990)).

rational and competent.”<sup>80</sup> Likewise, the Third Circuit found “organic brain syndrome caused by a childhood head injury, bipolar disorder, and borderline personality disorder” relevant because it supported defendant’s claim of psychological impairment.<sup>81</sup> Again, rationality, competence, and the lack of psychological impairment, are compatible with the truth of determinism.

The Supreme Court’s decisions in *Roper*, *Graham*, and *Miller* on juvenile sentencing do not provide support for incompatibilist legal reasoning, despite the neuroscience references.<sup>82</sup> These “cases relied on three significant gaps between juveniles and adults” to establish juveniles’ lessened culpability: juveniles lack maturity and a developed sense of responsibility, “leading to recklessness, impulsivity, and heedless risk-taking”; they have limited ability to control and escape criminogenic environments; and their characters are not yet fixed.<sup>83</sup> Notice that the considerations are compatibilist in that they are deemed to reduce culpability without implying universal excuse or mitigation should determinism be true. Even if determinism is true, it morally matters that juveniles’ traits are less fixed than adults’. General recklessness, impulsivity, and heedless risk-taking are signs of juveniles’ lesser capacity for rationality. The Court cites “developments in psychology and brain science,” not because they expose causes per se of juvenile behavior, but because “those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s ‘moral culpability’ and enhanced the prospect that . . . his ‘deficiencies will be reformed.’”<sup>84</sup>

It is more complicated to reconcile compatibilism with the acceptance of childhood abuse evidence in capital trials. Though this topic requires more in-depth analysis, let me summarize three reasons why this evidence should not throw doubt on the compatibilist interpretation of criminal responsibility criteria. First, evidence of childhood abuse could be offered to bolster claims that the defendant suffers from psychological impairments that indicate diminished rationality. The evidence could lend credibility to defendant’s claim of psychological problems and demonstrate that he is not at fault for such impairments. The evidence would not be relevant as a cause of violence per se.

Second, the judgment that severe childhood abuse and deprivation should mitigate punishment need not rest on a belief about diminished responsibility. An individual’s degree of responsibility is only one factor relevant to moral desert. To illustrate, the degree to which one was provided a minimally decent moral

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<sup>80</sup> *Id.*

<sup>81</sup> *Blystone v. Horn*, 664 F.3d 397, 421 (3d Cir. 2011).

<sup>82</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that the Eighth Amendment prohibits mandatory life-without-parole for juveniles); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment forbids life-without-parole for juvenile nonhomicide offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids execution for juveniles).

<sup>83</sup> *Miller*, 132 S. Ct. at 2464.

<sup>84</sup> *Id.* at 2464–65.

education could be relevant to moral desert because it helps people choose more wisely. Arguably, it is justified to punish more harshly a defendant who was provided a decent moral education than an individual who was not provided that same safeguard against bad choices, even if both are fully responsible for their behavior.

Finally, even if the first two reasons are unpersuasive or insufficient to justify childhood abuse evidence on compatibilist grounds, its admission does not support an alleged incompatibilist legal concern. The Supreme Court's death penalty jurisprudence grants a very broad right to present evidence as mitigating. A "low threshold for relevance"<sup>85</sup> is met (with regard to evidence about the defendant's character, record, or circumstances of the offense) when a "factfinder could reasonably deem [the evidence] to have mitigating value."<sup>86</sup> Accordingly, a state cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death."<sup>87</sup> Regardless of whether the admission of childhood abuse evidence can be, in actuality, reconciled with compatibilist criteria, it is admissible because the Court has granted this very broad right.

Adam Kolber raises several objections to the compatibilist interpretation of legal responsibility, specifically arguing that Stephen Morse has failed to establish it.<sup>88</sup> Kolber contends that statutes are virtually always "silent on fundamental issues of free will," revealing neither an incompatibilist nor compatibilist commitment.<sup>89</sup> Kolber first argues that the law has been "crafted over centuries" by many persons, many of whom believed humans have souls with contra-causal free will.<sup>90</sup> If the law has been crafted by libertarians, Kolber argues, we should be skeptical of Morse's compatibilist interpretation. Moreover, Kolber offers other reasons to "doubt that the law is fundamentally compatibilist."<sup>91</sup> Perhaps the law's concern with mental phenomena such as intentions and beliefs is based on the assumption that libertarian souls have intentions and beliefs. In the alternative, Kolber suggests, perhaps the law is incompatibilist but uses compatibilist criteria because they are "much easier [concepts] for us to understand and apply."<sup>92</sup>

None of Kolber's arguments undermines Morse's compatibilist interpretation of existing law. Morse's description of the law is based on the actual legal criteria of responsibility, not the views of some of their crafters. As discussed, legal criteria for responsibility can be fulfilled by persons even if all actions, choices, intentions, beliefs, and other psychological phenomena are causally determined.

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<sup>85</sup> *Tennard v. Dretke*, 542 U.S. 274, 285 (2004).

<sup>86</sup> *Id.* at 284 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)).

<sup>87</sup> *McKoy*, 494 U.S. at 441.

<sup>88</sup> *See* Kolber, *supra* note 8, at 820–27.

<sup>89</sup> *Id.* at 825.

<sup>90</sup> *Id.* at 823.

<sup>91</sup> *Id.* at 823.

<sup>92</sup> *Id.* at 825.

To concede that the legal criteria can be met in a deterministic universe is to concede that they are compatibilist.

Nonetheless, Kolber disagrees because the law is silent on whether determinism is true.<sup>93</sup> The law's silence on determinism is evidence, according to Kolber, that the law could be either compatibilist or libertarian. In short, Kolber argues that Morse has only shown that the law is "compatible with compatibilism," rather than compatibilist, because it is also compatible with people possessing libertarian free will.<sup>94</sup>

This rejoinder to Morse, however, misconstrues the issue at hand. The issue is not whether the law takes a position on determinism and whether we have libertarian free will. The issue is whether persons could meet the law's criteria for responsibility *even if* determinism is true and precludes libertarian free will. Maybe we have libertarian free will, maybe we do not. One need not take a position on determinism or the existence of free will in order to maintain that the law's actual criteria of responsibility are compatible with the non-existence of libertarian free will and are, therefore, compatibilist.

Kolber's focus, though, may not be on black letter law but on hidden "assumptions" lying beneath it.<sup>95</sup> He is interested in whether the law is vulnerable to the modern scientific worldview, reinforced by recent neuroscience, that we "live in a mechanistic universe."<sup>96</sup> If the law's underlying assumptions are libertarian, then the law, by its own lights, would be problematic on this worldview.

The possibility of such hidden assumptions, though, cannot undermine the compatibilist understanding of actual law: they could not be law. Imagine a bench trial in which the defendant, charged with theft, claims insanity under a volitional control prong. An expert testifies that the defendant's diagnosable mental disorder caused his criminal conduct. The defendant further argues that he lacked control over his conduct because his conduct was deterministically caused by events outside his control. Now stipulate that the judge, in rejecting the insanity claim, explicitly accepts the defendant's arguments that his actions were deterministically caused by facts outside his control, thereby accepting that he lacked contra-causal free will. The judge, nonetheless, explains that the defendant was not subject to a desire to steal so powerful that he could not contemplate reasons to refrain. The judge determines that the defendant would have refrained had he known that the victimized store had a hidden video camera. Is it plausible to describe the judge's decision as *contrary to law* even if Kolber is right that hidden libertarian assumptions lurk beneath the law in the sense that its crafters believed in libertarian souls? Whether the judge's decision is morally best or not, we would

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<sup>93</sup> Adam Kolber was generous with his time both to converse and provide written feedback on these issues.

<sup>94</sup> Thanks to Michael Cahill for providing a similar comment.

<sup>95</sup> Kolber, *supra* note 8 at 826.

<sup>96</sup> *Id.* at 810.

not describe it as contrary to law, demonstrating that any such “hidden assumption” is not part of the law. Kolber might respond that had the judge agreed with the defendant’s incompatibilist argument, the judge would not have violated the law in that scenario, either. But this hypothetical response would be beside the point: any such assumption, so hidden, is not law. If the modern scientific worldview presents any threat to law, that threat is not supported by the law itself; it would have to find support from people’s moral views that are independent from, and would have to conflict with, law that has been accepted for centuries. Again, this theoretical disagreement is practical: we should understand the nature of law’s responsibility criteria to understand the legal significance of scientific discoveries, whether from psychology, neuroscience, or another field.

Kolber’s arguments, then, seem directed at a related but different issue. He is interested in whether the law reflects a *societal commitment* to compatibilism about moral responsibility. Whether the law reflects *our* moral commitment to compatibilist beliefs is an important question within philosophical debates. Beyond the law’s actual criteria, we want to know whether the law is justified. What view about moral responsibility’s criteria do we have most reason to endorse? In ongoing philosophical debates, compatibilists do not merely argue that the law’s criteria are compatibilist; they also argue that the legal criteria *support* compatibilism, showing that it best fits with and explains our most deeply held commitments about moral responsibility. For example, Jay Wallace argues that his compatibilist account is persuasive because it, as opposed to any form of incompatibilism, best explains the circumstances in which we excuse or exempt agents from responsibility, such as when the law deems someone insane under *M’Naghten*.<sup>97</sup>

Thus, though Kolber’s arguments say nothing about the law’s actual criteria of responsibility, they may be relevant to broader philosophical debates about our actual commitments regarding moral responsibility. Kolber doubts that the law’s conception of responsibility provides evidence for compatibilism as the best view about moral responsibility’s criteria. Though he does not intend to engage such broader debates, it is to them that his arguments are relevant.

#### CONCLUSION

It is difficult to imagine empirical research that demonstrates whether an individual, in different circumstances, would have robbed that bank, assaulted his neighbor, or defrauded his clients. Regardless, the existing research on self-control neither assists such determinations nor suggests that existing standards are problematic. Moreover, no empirical research can help us determine, without recourse to a philosophical view about free will and responsibility, whether some

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<sup>97</sup> R. JAY WALLACE, *supra* note 65, at 118–194.



people had the requisite ability to control their behavior while others did not. Finally, to make legal determinations of responsibility, the law directs factfinders to use criteria that would be classified as compatibilist within free will debates.

